



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2004

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2004-1697

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197343.

The Texas Department of Criminal Justice (the "department") received a request for several categories of information relating to controlled substances, lethal injection, and inmate autopsies. You indicate that you have informed the requestor that the department does not maintain information responsive to portions of this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You contend that information responsive to the portion of the request that seeks "[a]ll written documents that describe every chemical used in lethal injections and the quantity and/or inventory of those chemicals since 1982" is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by and on behalf of the requestor. *See Gov't Code* § 552.304 (providing for submission of public comments).¹

Initially, we note that this office has previously issued a ruling regarding some of the information that is responsive to the present request. In Open Records Letter No. 2003-1091 (2003), this office allowed the department to withhold procedures relating to executions pursuant to section 552.108(b)(1) of the Government Code. In Open Records Decision No. 673 (2001), this office determined that a governmental body may rely on a ruling from

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

this office as a previous determination if the following conditions are met: the requested information is precisely the same information addressed in a prior attorney general ruling; the ruling is addressed to the same governmental body; the ruling concludes that the information is or is not excepted from disclosure; and the law, facts, and circumstances on which the ruling was based have not changed.

In this instance, you have submitted responsive execution procedures, which you inform us are "identical" to the ones at issue in Open Records Letter No. 2003-1091. You inform us that these same procedures "are still in effect as of this date and were in effect on the date of the request from [the requestor.]" Having reviewed the submitted procedures, we agree that they are precisely the same information that was at issue in our previous ruling. The prior ruling was also issued to the department and concluded that such procedures are excepted from disclosure under section 552.108. Finally, you indicate that the law, facts, and circumstances surrounding that ruling have not changed. We therefore agree that you may continue to rely on Open Records Letter No. 2003-1091 to withhold the responsive execution procedures.

We turn now to your arguments regarding section 552.103 for the remaining submitted information. This section provides:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.);

see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

You inform us that, prior to the department's receipt of this request, a named inmate filed suit against certain department officials and employees in the United States Supreme Court seeking to have his execution stayed pending the Court's disposition of another case that raises the same procedural issues. You also state that this action was still pending when the department received this request. Having considered your representations, we find that you have established that litigation was pending on the date the department received this request. *See* Gov't Code § 552.103(c) (information is excepted from disclosure under section 552.103 "only if the litigation is pending or reasonably anticipated *on the date that the requestor applies* to the officer for public information *for access to or duplication of the information*") (emphasis added). Furthermore, having reviewed your arguments and the remaining submitted information, we find that it is related to the pending proceeding for purposes of section 552.103. Therefore, the department may generally withhold the remaining submitted information pursuant to section 552.103.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information that has either been obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department may continue to rely on Open Records Letter No. 2003-1091 to withhold the responsive execution procedures. The remaining submitted information may be withheld under section 552.103 unless all other parties to the pending litigation have previously had access to it. As our ruling on these issues is dispositive, we need not address your remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

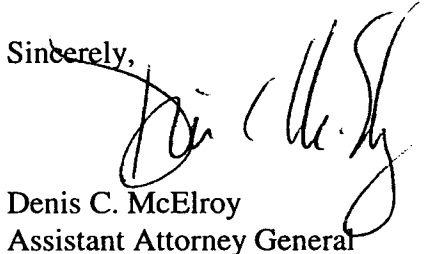
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 197343

Enc. Submitted documents

c: Ms. Alberta Phillips
Austin American-Statesman
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(w/o enclosures)